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Via ECF

February 13, 2017

Honorable Katherine Polk Failla
United States District Court
Southern District of New York
40 Foley Square, Room 2103
New York, NY 10007

Re: *Crede CG III, Ltd. v. 22nd Century Group, Inc.*, No. 1:16-cv-03103-KPF

Dear Judge Failla:

Pursuant to Rule 4(A) of the Court's Individual Rules and Practices for Civil Cases, Defendant 22nd Century Group, Inc. ("XXII") requests leave to file its planned motion for summary judgment on the remaining claims in this action, Count II (Breach of Contract – Repudiation of SPA), Count III (Declaratory Judgment – Tranche 1A Warrant Exchange Right), Count IV (Breach of Contract – Failure to Honor Tranche 1A Warrant Exchange Right), and Count V (Specific Performance – Tranche 1A Warrant Agreement) of Plaintiff Crede CG III, Ltd's ("Plaintiff") Amended Complaint.[1] XXII seeks to file this motion because the undisputed record evidence and the plain meaning of the applicable agreements are dispositive of the pending claims. Plaintiff does not consent to the filing of this motion.

I. **Motion for Summary Judgment:** Under Rule 56, summary judgment is proper if the record shows that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Indeed, "Rule 56 makes clear that a defendant 'may move *at any time*, with or without supporting affidavits, for summary judgment'", and "[d]istrict courts in our Circuit have recognized this, granting summary judgment prior to discovery in a few appropriate cases." *Emigra Group, LLC. V. Fragoment, Del Rey, Bernsen & Lowey, LLP,* 612 F. Supp.2d 330, 346 (SDNY 2009).

At the evidentiary hearing on Plaintiff's motion for temporary injunction held herein on June 14, 2016, the testimony of Plaintiff's principal, Terren Peizer, together with the email exhibits of his communications with others, established a record of undisputed facts that Mr. Peizer and Plaintiff had violated the Activities Restrictions set forth in Section 1(h)(ii) of the Tranche 1A Warrant. These violations in turn established that Plaintiff had not complied with Section 5 of the Tranche 1A Warrant, which under the plain meaning of Section 5, voided Plaintiff's Exchange Rights. Counts II, III, IV and V are all founded upon whether XXII's determination was proper -- that Plaintiff's undisputed conduct violated the Activities Restrictions and voided Plaintiff's Exchange Rights under the plain meaning of Section 5 of the Tranche 1A Warrant. There is no material issue as to the foregoing (and two other grounds identified below) and therefore XXII seeks to file its motion for summary judgment at this juncture to allow for an efficient conclusion to this case. XXII is entitled to summary judgment for several reasons.

A. **The Uncontroverted Evidence of Plaintiff's Breach of the Activities Restrictions Voids Plaintiff's Exchange Rights**. Plaintiff's claims in this case are all based upon Plaintiff's allegation that XXII wrongfully failed to honor Plaintiff's Exchange Rights under the Tranche 1A Warrant. Section 5 of the Tranche 1A Warrant expressly provides that "this Warrant shall be exchangeable by the Holder [Plaintiff] on a cashless basis as further set forth below (**and subject to the limitations set forth in Section 1(h)(ii)**

[1] Pursuant to this Court's *Opinion and Order* dated January 20, 2017, Counts I, VI, and VII were severed from this action and the Clerk of Court was directed to transfer the claims to the United States District Court for the Western District of New York. (Doc. No. 43). Counts II, III, IV, and V are the only remaining claims in this case.

hereof)." (Emphasis added). The "limitations set forth in Section 1(h)(ii)" were certain Activity Restrictions that broadly provided that Plaintiff would not "engage or participate in any actions, plans or proposals which relate to or would result in" Plaintiff or its affiliates acquiring more than 9.9% of XXII's common stock (subsection A), any change in the present board of directors or management of XXII (subsection D), any material change in XXII's business or corporate structure (subsection F), or any other action, intention, plan or arrangement similar to the above (subsection J).

At the June 14, 2016 evidentiary hearing on Plaintiff's motion for temporary injunction, Plaintiff's principal, Mr. Peizer, admitted that he sent certain emails and had certain communications with others that unambiguously violated the Activity Restrictions of the Tranche 1A Warrant, including but not limited to the following:

- On February 18, 2015, Mr. Peizer sent an email to the Chairman of the Board and the CEO of XXII, copying XXII's investment banker and representatives of one of XXII's larger shareholders, stating that Mr. Peizer was "serious as a heart attack" that "change will necessarily come about" due to the Board's purported failure to listen to Mr. Peizer.
- On March 19, 2015, Mr. Peizer sent another email to the Chairman and CEO of XXII demanding that the Chairman "must step aside" and "get out of the way," and that Mr. Peizer be "in control," threatening that "frankly I [Mr. Peizer] rather [sic] put a proxy on the board and Chairman" at the upcoming annual meeting in late April 2015.
- On March 25, 2015, Mr. Peizer sent another email to the Chairman and CEO of XXII, copying XXII's investment banker and several shareholders demanding change on XXII's Board of Directors.
- On April 9, 2015, Mr. Peizer sent another email to each member of XXII's Board of Directors and its CEO in which he stated that "the investment community continues to lose faith in the company's leadership," the "loss of confidence among shareholders about the ability of Management and the Board to lead the Company" and that "unless I [Mr. Peizer] meet with authorized representatives of the company by April 24, 2015 . . . I will have no recourse but to pursue alternative publically [sic] disclosed courses of action."
- On April 10, 2015, Mr. Peizer sent an email to each of the members of the XXII Board, as well as the XXII CEO and important XXII shareholders, referencing his prior demands for the Chairman to resign and his threats to raise the issue at the upcoming annual shareholders meeting.

Also as was addressed at the temporary injunction hearing by this Court, the plain meaning of the Section 5 "subject to" language in the Tranche 1A Warrant was to make Plaintiff's Exchange Right subject to compliance with the Activity Restrictions in the Tranche 1A Warrant. Given the foregoing, summary judgment is appropriate on all of Plaintiff's remaining counts herein for the simple reason that uncontroverted evidence in the record from Mr. Peizer's own testimony reflects that Plaintiff's Exchange Rights were lost due to non-compliance with the Activity Restrictions, whether the claims seek rescission of the SPA (Count II), declaratory judgment (Count III), breach of contract damages (Count IV), or specific performance (Count V).

B. The Alleged Breach of Tranche 1A Warrant Cannot Support Rescission of the SPA. Summary judgment is appropriate as to Plaintiff's rescission claim in Count II for an additional reason: that even if XXII had breached the Tranche 1A Warrant, which it did not, the alleged breach *of the Tranche 1A Warrant* would not support a claim for rescission *of the SPA* because *the SPA is wholly unrelated to the Tranche 1A Warrant.* Under New York law, rescission is an extraordinary remedy and may be granted only where a plaintiff demonstrates that the breach was so substantial and fundamental that it defeats the objective of the parties in making the contract. *Canfield v. Reynolds*, 631 F.2d 169, 178 (2d Cir. 1980); *see also*

Septembertide Pub., B.V. v. Stein & Day, Inc., 884 F.2d 675, 678 (2d Cir. 1989) (". . . rescission is appropriate only when a breach may be said to go to the root of the agreement between the parties.").

Here, because the SPA is on its face wholly separate from the Tranche 1A Warrant and contains an integration clause, *the alleged breach of the Tranche 1A Warrant,* as a matter of law, could not support a claim for *rescission of the SPA*. More specifically, the SPA in no way references or incorporates the Tranche 1A Warrant, and Section 9(a) provides, among other things, that the SPA "contained the entire understanding of the parties solely with respect to the matters covered herein and therein [the Transaction Documents]," and that "[e]xcept as specifically set forth herein or therein [the Transaction Documents], neither the Company [XXII], nor any Buyer [Plaintiff] makes any representation, warranty, consent or undertaking with respect to such matters," and "Company [XXII] has not, directly or indirectly, made any agreement with any Buyers related to the terms or conditions of the transactions contemplated by the Transaction Documents except as set forth in the Transaction Documents." In addition, in Section 2(e) of the SPA, Plaintiff represented and warranted that "Buyer is basing its decision to invest in the Securities on its own due diligence and, except as specifically set forth in this Agreement, has not relied upon any representations made by any Person."

Therefore, Plaintiff's claim in Count II for rescission of the SPA because of the alleged later breach of the Tranche 1A Warrant's Exchange Rights fails as a matter of law. *See Roseblatt v. Christie, Manson & Woods, Ltd.*, 195 Fed.Appx. 11 (2d Cir. 2006) (granting summary judgment for defendant where plaintiff alleged that it had breached certain agreements, but plaintiff's allegations fell outside of the four corners of the unambiguous contract). Simply put, under the unambiguous language of the SPA and the Tranche 1A Warrant, any breach of the Tranche 1A Warrant would be irrelevant to enforcement of the SPA, and thus does not support rescission of the SPA. In addition, Plaintiff's own allegations establish that the SPA was otherwise fully and completely performed by the parties. The SPA provides only that Plaintiff will make the $10 million investment in XXII (which $10 million is to be used "for general corporate purposes" as expressly stated in Section 4(d) of the SPA) and receive XXII common stock in exchange, which Plaintiff admits occurred. (Decl. Peizer, Ex. A; Am. Compl. ¶ 7). As a result, Plaintiff has not -- because it cannot -- alleged that any breach under the SPA has been made that would entitle it to rescission.

C. Plaintiff Can Bring No Claim for Declaratory Judgement Because It has An Adequate Remedy At Law. Count III alleges a claim for declaratory judgment regarding the Tranche 1A Warrant. This claim fails as a matter of law for the additional reason that Plaintiff has an adequate, alternative remedy -- namely its breach of contract claims pled in Counts IV and V of its Amended Complaint. New York law provides that "[a] cause of action for a declaratory judgment is unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action, such as a breach of contract." *Apple Records, Inc. v. Capitol Records, Inc.*, 529 N.Y.S.2d 279, 281 (N.Y. Sup. Ct. 1988). Indeed, in cases such as this one, where the declaratory judgment claim parallels breach of contract claims, "a declaratory judgment shall not be granted." *Id.*

II. Conclusion. Plaintiff's remaining claims in this action (Counts II-V) are ripe for entry of summary judgment and the efficient disposition of this case. Requiring months of discovery beforehand would only delay the inevitable and add great expense because the motion as outlined above will be based upon Plaintiff's own testimony and the plain meaning of the agreements, and unaffected by further discovery.

Respectfully submitted,

John A. Tucker, Esq.

cc: Counsel of Record